Filed 9/28/09 P. v. Bray CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES ROBERT BRAY, JR.,

Defendant and Appellant.

F055926

(Super. Ct. No. 08CM1276)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Julia J. Spikes, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Peter H. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

A jury convicted appellant James Robert Bray, Jr., of indecent exposure and found he had been convicted twice previously of the same offense. Bray contends his

conviction must be reversed because the trial court (1) failed to advise him properly before he admitted the prior convictions and (2) instructed the jury improperly. We conclude that any error was harmless and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On the early afternoon of April 23, 2008, Lori Perez and Raileen Knudson were traveling in the latter's car to have lunch at Las Primas Restaurant in Hanford. At one point, they entered a school zone and Perez saw many children. When their car reached the intersection of Florinda and Brown, Perez noticed a man on the driver's side of their vehicle on the northeast corner of the intersection. He was standing in a driveway to an apartment complex. The man was dressed in dark, loose-fitting shorts with the hem at midthigh. When their car got directly in front of the man, he used his right hand to pull his shorts "all the way up" and expose his genitals. Perez said the man pulled his shorts "up and over and looked right at us. It was very purposeful."

Perez was surprised by the man's conduct and told Knudson, "that guy just flashed us." Perez was offended by the man's conduct because there were children in the area. Perez and Knudson decided to call the police. After driving about one block past the man, Knudson turned the car around because she wanted to verify the cross street where he was located. Perez was on a cell phone when they backtracked to the apartment complex. She studied the man and noticed he was wearing a black T-shirt, dark shorts, and sunglasses. In the courtroom, Perez described Bray as a man with dark hair, a moustache, and a goatee. She identified Bray as the man who had exposed himself on Florinda Street.

Knudson testified she and Perez were traveling eastbound on Florinda on April 23, 2008. As they passed by McCarthy School, Knudson noticed a lot of children walking around the street. They passed the school and a church and proceeded down Florinda. Perez said suddenly, "oh, my God! That guy just exposed himself." Knudson did not see the man expose himself but told Perez they needed to turn around and call the police

because there were children walking in the area. Knudson turned the car around and drove it almost directly in front of the man but on the other side of the street, opposite the apartment complex.

Knudson looked at the man while Perez called police. Knudson saw the man take his right hand and start to pull his shorts upward. Knudson saw part of a testicle and then looked away. She said the man looked directly at her when he engaged in this conduct. In the courtroom, she identified Bray as the man who had exposed his testicle on April 23, 2008. On the day of the incident, Bray was dressed in a black T-shirt, dark sweat shorts, and dark sunglasses.

Fresno Police Officer Michael J. Neveu testified he investigated a case of indecent exposure by Bray in 2001. A female complainant reported a white Honda with a red stripe on it had driven up, and the driver had his pants down and exposed himself. The driver proceeded for some distance, returned, and did the same thing again. The complainant also indicated that Bray had engaged in the same conduct one week earlier in 2001.

Neveu further testified that Bray confirmed the female complainant's story as to both 2001 incidents. Bray told Neveu he had a problem; he had been arrested for it before; and he had been going to counseling. Bray said the counseling eventually stopped because of scheduling conflicts and the absence of insurance to pay for sessions. Bray said he started having problems and stress again after the counseling stopped. Bray told Neveu he wanted the trial court to help him get back into therapy. Bray also told Neveu he and other family members had been molested by an uncle, and a therapist told him that was the cause of his behavior.

Hanford Police Officer Chad Allen testified he investigated the April 23, 2008, incident. He spoke to Bray in the driveway leading to the apartment complex off of Florinda Street. Allen told Bray he was being accused of exposing himself to a passing vehicle. Allen said Bray was calm, nonchalant, and not really bothered by the accusation.

Allen said Bray was dressed in a black shirt and dark blue basketball shorts that went to the top of his knee. Bray said he saw the two females parked across the street from the apartment complex. Bray also said he never exposed himself at any time.

The parties stipulated that Bray was convicted of violating Penal Code section 314, subdivision 1[1] on February 15, 1991 (*People v. Bray* (Super. Ct. Tulare County, No. 29984)) and May 30, 2001 (*People v. Bray* (Super. Ct. Fresno County, Central Division, No. F01902425-8)).

Bray testified he was born on October 20, 1967, and lived in an apartment in the 300 block of East Florinda in Hanford on April 23, 2008. Bray said he had sustained the 1991 and 2001 convictions and pleaded guilty in those cases because "I was guilty." He later testified he first was convicted in 1989. Bray said he went to the apartment complex driveway more than once on April 23, 2008. The first time was at noon when he went to check his mail. The mail had not arrived and he had a five-minute conversation with a woman who was walking her dog.

Around 1:00 p.m., Bray picked up his daughter from school, went back outside, and again checked the mail. He was dressed in a black T-shirt, dark blue nylon gym shorts, sandals, and sunglasses. He was not wearing underwear that day.

Bray located mail in his mailbox. He saw Perez and Knudson pull up next to the apartment complex and a short time later park across the street from the complex. He watched them for 20 or 30 seconds and then went back inside his apartment. He thought they might be coming into the apartments to check on vacancies. He denied exposing any of his genitals to them.

Bray initially told officers it was possible that Perez and Knudson saw him scratch himself. He also said he was not paying attention to anyone around the complex when he scratched himself. He, however, denied pulling down his pants. He did acknowledge

[1]All further statutory references are to the Penal Code unless otherwise noted.

that he lifted his shorts, put his hand underneath his shorts, and scratched himself. Bray said, "I wasn't standing there pulling my pants over to expose myself to them." He acknowledged, however, "I might have exposed myself to them scratching myself . . . that's the only thing I could think of." He also testified, "evidently I exposed myself to them when I scratched myself, if they saw me scratching myself. I don't know, I couldn't tell you."

On July 11, 2008, after a two-day trial, a jury convicted Bray of one count of felony indecent exposure (§ 314) and found the alleged prior convictions to be true.

On August 12, 2008, the trial court sentenced Bray to the upper term of three years in state prison, imposed various fines and assessments, awarded 168 days of custody credit, ordered Bray to register as a sex offender (§ 290), and to provide samples of prints and bodily fluids (§ 296, subd. (a)).

DISCUSSION

Bray challenges the conviction on three grounds. He contends the trial court violated his right to due process when it failed to advise him of his constitutional rights before accepting the admission of his prior convictions. He also argues that there was insufficient evidence to support the true findings on the prior convictions. Finally, he claims the trial court erroneously instructed the jury with Judicial Council of California Criminal Jury Instructions (2008) CALCRIM No. 359 (corpus delicti: independent evidence of a charged crime). We also discuss an issue raised by Bray at oral argument.

I. Advisement of Rights

Bray maintains the record does not show that the trial court advised him of his rights and that he voluntarily and knowingly waived them as required under *Boykin v. Alabama* (1969) 395 U.S. 238 (*Boykin*), *In re Tahl* (1969) 1 Cal.3d 122 (*Tahl*), and *In re Yurko* (1974) 10 Cal.3d 857 (*Yurko*).

The information alleged that Bray had two convictions as follows:

"**Conv. Date**	**Section**	**Court**	**Docket #**
"2-15-91	PC 314(1)	Tulare County Superior	29984
"5-30-01	PC 314(1)	Fresno [Co.] Superior, Central	F01902425-8"

In these types of cases, counsel for defendants commonly ask that the determination of the validity of the prior convictions be bifurcated from the determination of the substantive charge. That did not occur here. Instead, defense counsel specifically asked that the complete information be read to the jury, including the allegations concerning the priors. Then, both the prosecutor and defense counsel in their opening statements specifically discussed, without objection or dispute, the priors as having occurred. It clearly was not a disputed issue in the case.

At the conclusion of the prosecution's case, the following exchange occurred:

> "MR. NAVARRETE [deputy district attorney]: Well, we need to put on the record the stipulation.
>
> "THE COURT: Do you have it in writing?
>
> "MR. NAVARRETE: No. We could just say it right now and we will just stipulate that the defendant agrees he has been convicted as having two priors as alleged in the information.
>
> "MS. GILBERT [defense counsel]: That is our stipulation, your Honor. My client does admit that he has been previously convicted in 1991 and 2001, that he has maintained his innocence as to this charge.
>
> "THE COURT: Okay. And so that it's specific as to what we have in the information, the parties stipulate or agree that the defendant is the person that was convicted on February 15th 1991, for violating Penal Code Section 314, Subsection 1 out of the Tulare County Superior Court, Docket Number 29984 and also convicted on May 30th, 2001, for violating Penal

Code Section 314, Subsection 1 out of Fresno County Superior Court, Central Division, Docket Number F01902425 dash 8.

"And that is the agreement of the parties, is that correct, Ms. Gilbert?

"MS. GILBERT: Yes.

"THE COURT: And, Mr. Navarrete?

"MR. NAVARRETE: Yes, your Honor."

Bray subsequently testified on his own behalf and the following exchange occurred:

"[MS. GILBERT:] And do you have a prior criminal record that we stipulated to to the jury, the conviction in 1991 and the conviction in 2001?

"[BRAY:] Do I have it?

"[MS. GILBERT:] Yes. Is that true?

"[BRAY:] What do you mean?

"[MS. GILBERT:] Have you been convicted?

"[BRAY:] Oh, yes.

"[MS. GILBERT:] And in those cases, did you plea[d] guilty to the charges?

"[BRAY:] Yes.

"[MS. GILBERT:] And why did you do that, plea[d] guilty?

"[BRAY:] Because I was guilty.

"[MS. GILBERT:] Because you were guilty.

"[BRAY:] I was guilty."

Bray now contends his current charge would have been a misdemeanor rather than a felony but for his admission and stipulation, or proof by the district attorney, of the prior convictions. As there were direct penal consequences to his stipulation, the trial court had a duty to advise him fully of his constitutional rights pursuant to the rule of *Boykin-Tahl*. Absent an affirmative showing in the record that Bray knew of his rights,

and affirmatively waived them, the conviction must be reversed and the case remanded to the trial court with instructions to offer him the opportunity to withdraw his stipulation.

Section 314, subdivision 1 is a hybrid offense, classified as a misdemeanor or felony, with greatly increased maximum punishment, dependent upon the presence or absence of certain factors. These additional factors that prescribe the more serious felony punishment include commission of the offense after unauthorized entry into a residence and prior related convictions. These factors evidence a legislative judgment that the factors in combination constitute a more serious felony offense. The aggravating circumstances that make violation of section 314, subdivision 1 a more serious offense and thereby a felony—including the recidivist provisions—do not meet the definition of "enhancement" as that term is used in section 805 (governing the time of commencing criminal actions). (*People v. Johnson* (2006) 145 Cal.App.4th 895, 904-905.)

Generally speaking, a first conviction for violating section 314, subdivision 1 is a misdemeanor and the second and subsequent convictions are expressly treated as felonies. This court has specifically held: "'[T]he recidivist provision of Penal Code section 314, subdivision 1, deals with enhanced punishment for repeat offenders and does not create a new substantive offense.'" (*People v. Finley* (1994) 26 Cal.App.4th 454, 456-458.) The prior conviction allegation in a section 314 charge is a sentencing factor to be determined by the trial court and not an element of the indecent exposure offense. (*People v. Merkley* (1996) 51 Cal.App.4th 472, 476.)

***Boykin/Tahl/Yurko* Rights**

In *Boykin, supra*, 395 U.S. at pp. 242-243, the United States Supreme Court held that a waiver of the privilege against compulsory self-incrimination, the right to a trial by jury, and the right to confront one's accusers cannot be inferred from a silent record. In *Tahl, supra,* 1 Cal.3d at pp. 131-133, the California Supreme Court interpreted *Boykin* in such a way as to require an express waiver of the three federal constitutional rights upon entry of a guilty plea, even though the *Boykin* opinion did not explicitly impose such a

requirement. In *In re Mosley* (1970) 1 Cal.3d 913, 926, footnote 10, the California Supreme Court required an affirmative showing of a criminal defendant's waiver of the three constitutional rights in future cases involving the use of stipulations to submit the case to the trial court on a preliminary hearing transcript. The Supreme Court applied this rule to "stipulations which, in the circumstances of the particular case, are *in fact* tantamount to a plea of guilty." (*Ibid.*)

In *People v. Levey* (1973) 8 Cal.3d 648, 652-654, disapproved in part in *People v. Howard* (1992) 1 Cal.4th 1132, 1175, the Supreme Court found that reversal was required if a submission was "tantamount to a guilty plea" and the conviction was obtained without a proper advisement and waiver of the right against self-incrimination. In *Yurko, supra,* 10 Cal.3d 857, the California Supreme Court concluded that *Boykin* and *Tahl* require express and specific admonitions as to the constitutional rights before a trial court accepts an accused's admission that he or she has suffered prior felony convictions.

In *People v. Adams* (1993) 6 Cal.4th 570 (*Adams*), the Supreme Court considered whether the *Boykin-Tahl* advisements were required when the defendant stipulated to a factual allegation—of his having been released on bail at the time an alleged offense occurred. That allegation was one component of the enhancement and sentencing provision within section 12022.1 (felony committed while released on bail or own recognizance). The Court of Appeal had held that the trial court erred in failing to give the *Boykin-Tahl* advisements before accepting the stipulation. The Supreme Court disagreed, concluding that the defendant's stipulation was a stipulation to evidentiary facts and not an admission that the enhancement allegation itself was true or an admission of every element necessary to imposition of punishment on the section 12022.1 charge. Therefore, the Supreme Court concluded the requirements of *Boykin-Tahl* and *Yurko* were inapplicable. (*Adams,* at p. 573.)

In *People v. Newman* (1999) 21 Cal.4th 413, the Supreme Court was presented with the question whether, in a prosecution for possession of a firearm by a felon

(§ 12021, subd. (a)(1)), a defendant must receive *Boykin-Tahl* advisements and waive the relevant constitutional rights prior to stipulating to his or her status as a felon. The Supreme Court held the question was controlled by the reasoning in the *Adams* case and concluded a defendant may validly stipulate to one or more, but not all, of the evidentiary facts necessary to a conviction of an offense or an enhancement without first having received such advisements. As in *Adams*, no penal consequences flowed directly from the stipulation and the prosecutor still was required to prove the remaining elements of the offense. The Supreme Court specifically concluded: "[T]he trial court was not required to provide the *Boykin-Tahl* advisements before permitting defendant, through his counsel, to stipulate during his trial for possession of a firearm by a felon that he previously had been convicted of a felony." (*Newman*, at p. 422.)

Neither Bray nor the People cite to *Newman*, although Bray does cite to *Adams*. Nevertheless, Bray maintains his stipulation and admission had direct penal consequences because they established that he was subject to enhanced sentencing. Bray is mistaken. Here, as in *Adams* and *Newman*, no penal consequences flowed directly from the stipulation as to the prior convictions of section 314. The prosecutor still was required to prove that Bray exposed his person or the private parts thereof, in any public place, or in any place where there were present other persons to be offended or annoyed thereby, as required by section 314, subdivision 1. Absent such proof, the stipulation and admission did not yield direct penal consequences.

But, we do not have to rely on the above analysis to affirm the conviction. Even if the record does not reveal complete advisements and waivers, we can examine the record of the entire proceeding to assess whether the defendant's admission of the prior conviction was intelligent and voluntary in light of the totality of the circumstances. The totality of the circumstances test applies to silent record cases as well as to cases involving incomplete *Boykin-Tahl* advisements. (*People v. Mosby* (2004) 33 Cal.4th 353, 359, 361-362.) The People concede the instant record is silent as to whether Bray was

properly advised of and waived his rights under *Boykin-Tahl.* The People nevertheless submit Bray's past experiences in the criminal justice system supported a conclusion that he knew his rights under *Boykin-Tahl,* including his privilege against self-incrimination. Previous experience in the criminal justice system is relevant to a recidivist's knowledge and sophistication regarding his or her legal rights. (*Mosby*, at p. 365.)

Here, the issue of the prior convictions was not contested. Counsel for Bray clearly wanted the jury to learn of the convictions, and their having been entered after a plea, so the anticipated denial by Bray of the current allegation would seem more credible. This was a specific strategy by a shrewd defense counsel. This strategy belies any argument by Bray here that he did not know what he was doing when he stipulated to having suffered the prior convictions.

The stipulation was a tactical choice and the prior conviction easily could be proven by reference to standard sources. (*People v. Robertson* (1992) 11 Cal.App.4th 835, 842-843, disapproved on another point in *People v. Newman*, *supra*, 21 Cal.4th at pp. 422-423, fn. 6.) At the May 5, 2008, preliminary hearing, the trial court received into evidence (1) a certified copy of the minute order in Bray's 2001 Fresno County indecent exposure case (No. F01902425-8); (2) a certified copy of the felony advisement/waiver of rights/plea form in that same Fresno County case; and (3) a certified copy of the felony complaint in that Fresno County case.

If Bray had declined to stipulate to his prior convictions after a full and proper advisement at trial, the prosecution easily could have proffered these exhibits as documentary proof of the special allegations in the information. We particularly note that Bray, his counsel, and the trial court in the Fresno County case all signed the felony advisement/waiver of rights/plea form on March 12, 2001, and the form set forth a detailed recitation of the *Boykin/Tahl/Yurko* rights. Each recitation of a right had corresponding boxes, which Bray initialed to signify "I understand this right" and "I give up this right."

Bray was represented by counsel in a jury trial and had confronted and cross-examined the prosecution witnesses prior to entering into the stipulation. He had suffered two convictions where, after extensive written advisement of his rights, he acknowledged and waived them in writing. Bray had more than a passing familiarity with these constitutional rights at the time of his trial here. Thus, we conclude, under the totality of the circumstances, Bray's admission of the prior convictions was intelligent and voluntary.

II. Sufficiency of the Evidence

Bray maintains that since the only evidence he suffered a prior conviction was the stipulation and his testimony, the finding by the jury must be vacated and the felony conviction must be reduced to a misdemeanor. He argues this is so because the stipulation is invalid for the reasons discussed above, which we have rejected, and a prior conviction may be proven only by the record of conviction.

In reviewing a challenge to the sufficiency of the evidence to support a sentence enhancement, the reviewing court must examine the entire record to determine whether a reasonable trier of fact could have found the prosecution sustained the burden of proof beyond a reasonable doubt. In making this determination, the reviewing court must consider the evidence in a light most favorable to the judgment. The trial court must presume the existence of every fact the trier reasonably could deduce from the evidence in support of the enhancement. The test is whether substantial evidence supports the conclusion of the trier and not whether the evidence has proven guilt beyond a reasonable doubt. (*People v. Miles* (2008) 43 Cal.4th 1074, 1083; *People v. Delgado* (2008) 43 Cal.4th 1059, 1067.)

We initially note a criminal defendant may not acquiesce in the trial court's finding that his stipulation amounted to an admission of the prior conviction allegations and then raise as an issue on appeal that he did not admit the allegations. (Cf. *People v.*

Maxey (1985) 172 Cal.App.3d 661, 668 [the defendant may not stand silently by or acquiesce in a finding that his prior burglary was theft related and then contend on appeal that it was committed without the intent to commit a theft].) Accordingly, we conclude Bray forfeited his right to challenge on appeal the validity of his admission of the prior convictions of section 314.

Nevertheless, even if this issue were properly before us, we would reject it. A defendant is bound by the stipulation of his counsel. (*People v. Pijal* (1973) 33 Cal.App.3d 682, 697.) Also, "generally an admission of a prior conviction allegation admits all elements of the prior conviction and all elements of offenses necessarily included in the prior conviction offense, just as a plea of guilty admits every element of a charged offense. [Citation.]" (*Ibid.*) Further, admissions of enhancements are subject to the same principles as guilty pleas. (*People v. Watts* (2005) 131 Cal.App.4th 589, 594-595.)

Here, Bray testified that he pleaded guilty to indecent exposure in 1991 and 2001. He also testified that he had a conversation with Neveu in 2001. Neveu testified he investigated a case of indecent exposure by Bray in 2001. Neveu said he interviewed Bray and the latter was "very forthright and open with me." Bray told Officer Neveu he had exposed himself in a car and Bray's version of events matched those of a complaining witness.

In view of this testimony, we conclude the truth of the prior conviction allegations was supported by substantial evidence.[2]

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[2]Bray cites *People v. Trujillo* (2006) 40 Cal.4th 165, 179 for the proposition that a finder of fact may not go beyond the record of conviction by using a defendant's admissions in a probation report. The Supreme Court specifically concluded: "[A] defendant's statements, made after a defendant's plea of guilty has been accepted, that appear in a probation officer's report prepared after the guilty plea has been accepted are not part of the record of the prior conviction." (*Ibid.*) That is because such statements do not reflect the facts of the offense for which the defendant was convicted. (*Ibid.*) Here,

III. Advisement Before Testifying

During oral argument, Bray's counsel seemed to argue that the trial court had a sua sponte duty to advise Bray of his right against self-incrimination before allowing Bray to testify. This issue was not mentioned in the briefs and counsel did not cite any authority to support this contention. We could not find such authority.

To the contrary, when a defendant is represented by counsel and voluntarily takes the witness stand, the individual has waived the Fifth Amendment privilege. (*People v. Vargas* (1987) 195 Cal.App.3d 1385, 1391.) Therefore, "the court has no duty to admonish the defendant regarding constitutional rights or to take a formal waiver of those rights. [Citation.]" (*Ibid.*) Hence, the trial court here was not required to inquire further concerning Bray's decision or to offer him advice concerning it.

IV. The Instructing of the Jury with CALCRIM No. 359

Bray acknowledges he made several pretrial statements that did not amount to confessions or admissions, but the trial court nevertheless instructed the jury with CALCRIM No. 359 (corpus delicti: independent evidence of a charged crime), thereby committing reversible error.

Bray contends the only statements he made that might be considered incriminating were that he was not wearing underwear at the time and that he scratched his genitals. Thus, it was error to instruct the jury that these statements, together with "slight" other evidence, were sufficient to convict him.

CALCRIM No. 359, as given to the jury, read:

> "The defendant may not be convicted of any crime based on his out-of-court statements alone. You may only rely on the defendant's out-of-court statements to convict him if you conclude that other evidence shows

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while Bray's testimony at the current trial was not part of the prior record, it was competent, relevant evidence that "does indeed reflect the facts of the offense for which he was convicted."

> that the charged crime was committed. That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed.
>
> "The identity of the person who committed the crime may be proved by the defendant's statements alone. You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt."

""""The corpus delicti of a crime consists of two elements, the fact of the injury or loss or harm, and the existence of a criminal agency as its cause."""" (*People v. Zapien* (1993) 4 Cal.4th 929, 985-986.) "In any criminal prosecution, the corpus delicti must be *established* by the prosecution independently from the extrajudicial statements, confessions or admissions of the defendant. [Citations.]" (*People v. Wright* (1990) 52 Cal.3d 367, 403-404, italics added; see *People v. Diaz* (1992) 3 Cal.4th 495, 528-529.) Such independent proof may consist of circumstantial evidence and need not establish the crime beyond a reasonable doubt. (*People v. Jones* (1998) 17 Cal.4th 279, 301 (*Jones*).)

"The purpose of the corpus delicti rule is to assure that 'the accused is not admitting to a crime that never occurred.' [Citation.] The amount of independent proof of a crime required for this purpose is quite small; we have described this quantum of evidence as 'slight' [citation] or 'minimal' [citation]. The People need make only a prima facie showing '"permitting the reasonable inference that a crime was committed."' [Citations.] The inference need not be 'the only, or even the most compelling one … [but need only be] a *reasonable* one ….' [Citation.]" (*Jones, supra,* 17 Cal.4th at pp. 301-302.)

In determining the correctness of a jury instruction, an appellate court considers the instructions as a whole. (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1061.) A party rarely succeeds by isolating a phrase or word in an instruction and ignoring all the remaining language in the instruction, and the other instructions given. Here, the trial court instructed the jury extensively on the correct burden of proof. Included as part of those instructions was this part of CALCRIM No. 359: "You may not convict the

defendant unless the People have proved his guilt beyond a reasonable doubt." CALCRIM No. 359 correctly set forth the applicable burden of proof (§§ 1096, 1096a), and reversal for instructional error is not required. (*People v. Reyes* (2007) 151 Cal.App.4th 1491, 1498.) Bray's argument fails.

DISPOSITION

The judgment is affirmed.

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CORNELL, Acting P.J.

WE CONCUR:

_____
DAWSON, J.

_____
KANE, J.